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14-1457

No. _____

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

I. The Decision Below Deepens A Longstanding Split Over Whether The Speedy Trial Clause Protects Against Inordinate Sentencing Delays. 9

A. Federal And State Courts Are Squarely Divided On The Question Presented. 9

B. The Split Is Intractable. 13

II. The Question Whether the Sixth Amendment Attaches Through Final Disposition Is Important 14

III. This Case Is An Ideal Vehicle For This Court To Resolve This Issue. 19

IV. The Montana Supreme Court's Decision Is Incorrect. 22

CONCLUSION 24

APPENDIX A. Montana Supreme Court Decision 1a

APPENDIX B. Montana District Court, Order Denying Motion to Reconsider..... 24a

APPENDIX C. Montana District Court, Order Denying Motion to Dismiss 26a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5, 22

Barker v. Wingo,
407 U.S. 514 (1972) ..... passim

Berman v. United States,
302 U.S. 211 (1937) 6

Bozza v. United States,
330 U.S. 160 (1947) 6, 23, 24

Brady v. Superintendent,
443 F.2d 1307 (4th Cir. 1971) 11, 23

Brooks v. United States,
423 F.2d 1149 (8th Cir. 1970) 11

Burkett v. Cunningham (*Burkett I*),
826 F.2d 1208 (3d Cir. 1987) 7, 10, 19

Burkett v. Fulcomer (*Burkett II*),
951 F.2d 1431 (3d Cir. 1991) 15, 24

Dickey v. Florida,
398 U.S. 30 (1970) 18

Doggett v. United States,
505 U.S. 647 (1992) 18, 19, 20

Juarez-Casares v. United States,
496 F.2d 190 (5th Cir. 1974) 9, 10, 24

Klopfer v. North Carolina,
386 U.S. 213 (1967) 2, 14

Moore v. Arizona,
414 U.S. 25 (1973) 18

Perez v. Sullivan,
793 F.2d 249 (10th Cir. 1986) 9, 10, 13

Pollard v. United States,
352 U.S. 354 (1957) ..... passim

Ray v. United States,
559 U.S. 1107 (2010) 19

Strunk v. United States,
412 U.S. 434 (1973) 6

United States v. Abou-Kassem,
78 F.3d 161 (5th Cir. 1996) 9

United States v. Barken,
412 F.3d 1131 (9th Cir. 2005) 18

United States v. Bordon,
421 F.3d 1202 (11th Cir. 2005) 10

United States v. Campbell,
531 F.2d 1333 (5th Cir. 1976) 19

United States v. Carpenter,
781 F.3d 599 (1st Cir. 2015)..... 11, 13, 15

United States v. Danner,
429 F. App'x 915 (11th Cir. 2011)..... 10

United States v. Gibson,
353 F.3d 21 (D.C. Cir. 2003) 11

United States v. Gould,
672 F.3d 930 (10th Cir. 2012) 9

United States v. Howard,
577 F.2d 269 (5th Cir. 1978) 9

United States v. Lovasco,
431 U.S. 783 (1977) 17, 18, 19, 21

United States v. Martinez,
837 F.2d 861 (9th Cir. 1988) 11

United States v. Ray,
578 F.3d 184 (2d Cir. 2009) ..... passim

United States v. Reese,
568 F.2d 1246 (6th Cir. 1977) 10

United States v. Rothrock,
20 F.3d 709 (7th Cir. 1994) 11

United States v. Thomas,
167 F.3d 299 (6th Cir. 1999) 10

United States v. Yehling,
456 F.3d 1236 (10th Cir. 2006) 10

STATE CASES

Ball v. Whyte,
294 S.E.2d 270 (W. Va. 1982) 12

Commonwealth v. Glass,
586 A.2d 369 (Pa. 1991) 11

Commonwealth v. McInerney,
401 N.E.2d 821 (Mass. 1980) 11

Ex parte Apicella,
809 So. 2d 865 (Ala. 2001) 11

Gonzales v. State,
582 P.2d 630 (Alaska 1978) 11, 23

Jolly v. State,
189 S.W.3d 40 (Ark. 2004) 11, 23, 24

Moore v. State,
436 S.E.2d 201 (Ga. 1993) 11

Moore v. United States,
359 A.2d 299 (D.C. 1976) 12

People v. Sandoval-Candelaria,
321 P.3d 487 (Colo. 2014) 8, 11

Perdue v. Commonwealth,
82 S.W.3d 909 (Ky. 2002) 11

State ex rel. McLellan v. Cavanaugh,
498 A.2d 735 (N.H. 1985) ..... passim

State v. Allen,
505 N.W.2d 801 (Wis. App. 1993) 23

State v. Banks,
720 P.2d 1380 (Utah 1986) 11

State v. Dean,
536 A.2d 909 (Vt. 1987) 11

State v. Drake,
259 N.W.2d 862 (Iowa 1977) 12, 13

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350 A.2d 640 (Md. 1976) 11

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363 So. 2d 458 (La. 1978) 12, 13, 19

State v. Mooney,
137 P.3d 532 (Mont. 2006) 5, 12

State v. Pressley,
223 P.3d 299 (Kan. 2010) 8, 12, 13, 14

State v. Rich,
248 P.3d 597 (Wash. Ct. App. 2011) 24

State v. Smith,
159 P.3d 531 (Ariz. 2007) 11

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554 So. 2d 313 (Miss. 1989) 11, 24

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971 A.2d 135 (Del. 2009) 11

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Thomas Betterman respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 342 P.3d 971. The relevant orders of the trial court are unpublished, but are available at Pet. App. 24a, 26a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on February 10, 2015. Pet. App. 1a. On April 23, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2015. *See* 14A1084. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

STATEMENT OF THE CASE

This case presents a recurring question of constitutional law that has divided federal and state courts: whether the Sixth Amendment's Speedy Trial Clause protects a defendant from inordinate sentencing delays. Nearly sixty years ago, this Court in *Pollard v. United States* "assume[d] *arguendo*" that it does. 352 U.S. 354, 361 (1957). This Court has never answered the question it left open in *Pollard*. But, in the inter-

vening decades, federal and state courts have split over whether criminal defendants are entitled to Speedy Trial Clause protections as to sentencing.[1]

Many courts have held the Sixth Amendment speedy trial right applies at sentencing, and others have assumed it does, as this Court did in *Pollard*. Multiple courts, however, have held the opposite and concluded that the Sixth Amendment does not protect criminal defendants from delays in criminal proceedings once they have been found guilty.

The Montana Supreme Court joined this side of the split in the decision below, overruling its own recent holding to the contrary. The fluctuating state of the law in Montana epitomizes the confusion among lower courts over Sixth Amendment rights at sentencing. This Court should intervene and make clear that protracted delays in sentencing violate the Speedy Trial Clause.

1. Petitioner Brandon Betterman pleaded guilty to bail jumping in April 2012. Pet. App. 2a-3a. The conviction was based on his failure to appear at a 2011 court appearance on a domestic assault, which he had missed because he lacked the money or transportation to travel more than two hundred miles to attend court. *Id.* at 2a. Betterman turned himself in two months after missing that court appearance, and was sentenced to five years in state prison on the domestic assault conviction. *Ibid.* But he was still charged separately with bail jumping, to which he

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[1] This Court held that the Sixth Amendment's Speedy Trial Clause applies to the states through the Fourteenth Amendment in *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

pled guilty at his April 2012 arraignment. *Id.* at 2a-3a.

Betterman then waited more than fourteen months, until June 2013, to be sentenced on the bail jumping charge, spending all of that time in county jail. *Id.* at 2a, 4a. The delay began with a five-month wait for an "updated" pre-sentence investigation report and two months of subsequent silence from the district court. *Id.* at 3a. Finally, the court scheduled a sentencing hearing to be held nearly nine months after Betterman pled guilty to bail jumping. *Ibid.* At that sentencing hearing, in January 2013, Betterman filed a motion to dismiss the action, alleging an unconstitutional sentencing delay in violation of his right to a speedy trial under the Montana and United States Constitutions. *Id.* at 3a, 26a; Motion to Dismiss at 1, *Montana v. Betterman*, No. DC-12-45 (Jan. 17, 2013), Dkt. No. 22. The court declined to sentence Betterman at that time, continuing the sentencing hearing indefinitely. Pet. App. 3a-4a.

Betterman continued to press his right to a timely sentencing. In March 2013, both Betterman and the State requested that the court set a sentencing date. *Id.* at 3a. Even though nearly a year had passed since his guilty plea and Betterman was in local custody, the court responded that it would "not be able to 'fast track' [Betterman's] sentencing" due to pending civil matters. *Id.* at 3a-4a.

The following month, April 2013, the court denied Betterman's motion to dismiss on speedy trial grounds. *Id.* at 26a-27a. The court provided two reasons: (1) by pleading guilty, Betterman had waived his ability to raise a speedy trial claim; and (2) Bet-

terman's speedy trial claim failed on the merits. *Id.* at 31a, 37a.

Within a week, Betterman moved the court to reconsider its denial of his motion to dismiss, and filed an affidavit explaining to the court:

- "I have now spent approximately 442 or more days ... on [the domestic assault] sentence in the Butte Jail. In theory, I would be eligible for conditional release ... if I were in the Department of Corrections['] actual system."
- "[D]ue to my incarceration in the Butte Jail as I am informed, I have a warrant out of Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County."
- "In DC-11-36 [the domestic assault case], I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail."

Id. at 3a-4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27; Affidavit of Defendant at 1-2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Betterman further explained that he had sought counseling due to the anxiety and depression caused by his uncertain fate, and that the county was refusing to provide medical attention for his health issues. Pet. App. at 4a; Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. The court denied Betterman's motion for reconsideration the following month. Pet. App. at 24a-25a.

On June 27, 2013, more than fourteen months after Betterman pled guilty, the court finally sentenced Betterman to seven years in state prison, suspending a portion of that sentence. *Id.* at 4a.

2. Betterman appealed his sentence and conviction to the Montana Supreme Court, asserting that the fourteen-month delay between his guilty plea and sentencing violated his speedy trial rights under the Sixth Amendment and an analogous provision of the Montana Constitution. *Id.* at 1a-2a, 5a.

The Montana Supreme Court affirmed the trial court on different grounds, overturning its own precedent in the process. *Id.* at 2a, 15a. It first acknowledged its previous holding in *State v. Mooney*, 137 P.3d 532, 535 (Mont. 2006), "that the right to a speedy trial applies through sentencing." Pet. App. 7a (quoting *Mooney*, 137 P.3d at 535). But the court concluded that it needed to "reexamine" *Mooney*, noting it arrived at the holding there "without analysis or explanation and in apparent reliance on *Pollard*." *Id.* at 7a-8a.

After this "reexamin[ation]," the Montana Supreme Court determined that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive." *Id.* at 7a-8a, 14a. The court rested its decision on three grounds.

First, the court concluded that the historical understanding of a criminal "trial" did not include sentencing. *See id.* at 8a-11a. The court interpreted passages from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to confirm that "[s]entencing ... *followed* the verdict," such that it was not part of a "trial" for con-

stitutional speedy trial purposes. Pet. App. 9a-11a (emphasis added).

Second, the court evaluated the Sixth Amendment interests identified by this Court and determined that "[a] delayed sentencing raises different concerns than [does] a delay in proceeding to trial." *Id.* at 11a-13a. While recognizing that sentencing delay can have harmful effects, the Court concluded that those harms are "nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a.

Lastly, the court expressed concern that the only remedy for a speedy trial violation is dismissal of the charges. *Id.* at 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Dismissing the case on that ground, the court reasoned, would contravene the principle that a convicted defendant should not "escape punishment altogether" simply because a "court committed an error in passing sentence." *Ibid.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)).

After concluding that sentencing delays do not trigger the speedy trial right, the court examined whether Betterman's sentencing delay violated the Due Process Clause. The court concluded that the fourteen-month delay between Betterman's conviction and sentencing was "unacceptable," and without legitimate explanation. *Id.* at 20a. Despite this, the court denied relief because "any prejudice ... was not substantial and demonstrable." *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

"Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v.*

United States, 302 U.S. 211, 212 (1937). This Court has assumed, without deciding, "that sentence is part of the trial for purposes of the Sixth Amendment[']s Speedy Trial Clause]." *Pollard*, 352 U.S. at 361. The Montana Supreme Court nonetheless held that the Speedy Trial Clause does not apply to the sentencing phase of a criminal proceeding, deepening the split of authority among federal and state courts on this issue.

Five Circuits—the Third, Fifth, Sixth, Tenth, and Eleventh Circuits—all have recognized that inordinate sentencing delay may violate a defendant's speedy trial rights. These cases have reasoned that "the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution." *Burkett v. Cunningham* (*Burkett I*), 826 F.2d 1208, 1220 (3d Cir. 1987) (Becker, J.) (citation omitted). Six other Circuits—the First, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits—have assumed speedy trial protections attach at sentencing.

The Second Circuit has sharply disagreed, holding that "the Speedy Trial Clause of the Sixth Amendment, which governs the timing of trials, does *not* apply to sentencing proceedings." *United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009) (Cabranes, J.) (emphasis added). In the Second Circuit's view, "sentencing proceedings and trials are separate and distinct phases of criminal proceedings," and speedy trial protections apply only to the latter. *Ibid.*

The division among the federal courts on this issue mirrors the disarray among state courts of last resort. Many of those state courts have recognized that the

Speedy Trial Clause, and analogous state constitutional protections, apply through the sentencing phase of a criminal prosecution. *E.g.*, *State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 740 (N.H. 1985) (Souter, J.). Others have assumed the existence of the right, without squarely so holding. *E.g.*, *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014). And still others have taken the opposite side of the debate and rejected speedy trial challenges at sentencing. *E.g.*, *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010).

This Court should resolve the persistent split in authority and provide a clear answer to this important question. The Speedy Trial Clause's applicability to sentencing bears on every criminal case in which a conviction is obtained. The only alternative constitutional protection lies in the Due Process Clause, and the heavy burden criminal defendants face in mounting such a challenge makes it inadequate and poorly tailored to the speedy trial concerns arising from sentencing delays. What is more, the position that the Speedy Trial Clause does not protect against such delays is simply incorrect. Sentencing was inseparable from the conviction itself at common law. It would have been inconceivable to the Founders that the Speedy Trial Clause would protect a criminal defendant from unconstitutional delays in one but not the other.

This Court should heed the calls of lower courts to "directly examine[] and resolve[] the question" whether "Sixth Amendment speedy trial safeguards [apply] past the transition from accused to convict," and eliminate the decades-long confusion among lower courts that has been left in *Pollard*'s wake. *See*

United States v. Gould, 672 F.3d 930, 936 n.4 (10th Cir. 2012) (quoting *Perez v. Sullivan*, 793 F.2d 249, 253 n.2 (10th Cir. 1986)). This case is the ideal vehicle for deciding the applicability of the Speedy Trial Clause to sentencing. The question is cleanly presented, differentiating this case from others where this Court has denied review, and it comes to the Court in a situation where the state supreme court *reversed* its position on the matter.

I. The Decision Below Deepens A Longstanding Split Over Whether The Speedy Trial Clause Protects Against Inordinate Sentencing Delays.

A. Federal And State Courts Are Squarely Divided On The Question Presented.

1. The majority of the courts addressing the issue have applied the Sixth Amendment's Speedy Trial Clause to claims of unconstitutional sentencing delays.

a. The Third, Fifth, Sixth, Tenth and Eleventh Circuits have held that the Sixth Amendment's Speedy Trial Clause protects criminal defendants from inordinate delays in sentencing.

The Fifth Circuit, relying on *Pollard*, has held that "the imposition of sentence is part of the trial for the purposes of the Sixth Amendment speedy trial guarantee." *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (finding a violation and vacating sentence). The Fifth Circuit has consistently reaffirmed this holding. *See, e.g.*, *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996). The Eleventh Circuit has repeatedly followed

the Fifth Circuit's holding on that score. *See United States v. Danner*, 429 F. App'x 915, 917 (11th Cir. 2011) (explaining that "the protection of the Sixth Amendment right to a speedy trial extends to sentencing," citing and acknowledging that it is bound by *Juarez-Casares*); *accord United States v. Bordon*, 421 F.3d 1202, 1208 (11th Cir. 2005).

The Third Circuit has likewise held that the Speedy Trial Clause applies to sentencing delays. *Burkett I*, 826 F.2d at 1220. "We now make explicit," Judge Becker explained, "that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution—in other words, *until one final, pre-appellate determination has been made*" as to a defendant's sentence. *Ibid.* (emphasis added and citations omitted). The court then determined that the defendant "ha[d] established a speedy trial violation." *Id.* at 1223-25.

Reviewing its Sixth Amendment precedents, the Sixth Circuit has recognized that it previously "held that a defendant is entitled to a speedy sentencing." *See, e.g.*, *United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999) (citing *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977)). And the Tenth Circuit has stated, in clear terms, that "[t]he Sixth Amendment guarantees all criminal defendants the right to a speedy trial; we have applied this right from arrest through sentencing." *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (citing *Perez*, 793 F.2d at 253).

A number of state courts of last resort agree that the Speedy Trial Clause applies through the sentenc-

ing phase of a criminal prosecution. *See, e.g.*, *McLellan*, 498 A.2d at 740; *Ex parte Apicella*, 809 So. 2d 865, 869 (Ala. 2001); *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978); *Jolly v. State*, 189 S.W.3d 40, 45 (Ark. 2004); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002); *Trotter v. State*, 554 So. 2d 313, 314, 319 (Miss. 1989), *superseded by statute on other grounds*, Laws 2008, Ch. 457, § 1, eff. July 1, 2008; *Commonwealth v. Glass*, 586 A.2d 369, 371 (Pa. 1991); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986); *State v. Dean*, 536 A.2d 909, 912 (Vt. 1987).

b. Six federal courts of appeal and many other state supreme courts have, consistent with *Pollard*, assumed the applicability of the Speedy Trial Clause to sentencing without so deciding. *See, e.g.*, *United States v. Gibson*, 353 F.3d 21, 27 (D.C. Cir. 2003); *United States v. Carpenter*, 781 F.3d 599, 609-10 (1st Cir. 2015); *Brady v. Superintendent*, 443 F.2d 1307, 1310 (4th Cir. 1971); *United States v. Rothrock*, 20 F.3d 709, 711 (7th Cir. 1994); *Brooks v. United States*, 423 F.2d 1149, 1151 (8th Cir. 1970); *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988); *State v. Smith*, 159 P.3d 531, 544 (Ariz. 2007); *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014); *Weber v. State*, 971 A.2d 135, 160-61 (Del. 2009); *Moore v. State*, 436 S.E.2d 201, 202 (Ga. 1993); *State v. Erbe*, 350 A.2d 640, 642 (Md. 1976); *Commonwealth v. McInerney*, 401 N.E.2d 821, 825 (Mass. 1980).

2. A growing minority of courts, however, has categorically rejected the majority view.

The Second Circuit has "h[e]ld that the Speedy Trial Clause of the Sixth Amendment, which governs

the timing of trials, does *not* apply to sentencing proceedings." *Ray*, 578 F.3d at 198-99 (emphasis added). In so holding, Judge Cabranes acknowledged the contrary holdings of other federal circuit courts, but reasoned that "trial" historically "would not have encompassed sentencing proceedings," and that "the harms arising from delayed sentencing" are "quite different from those animating the Speedy Trial Clause." *See id.* at 192 & n.11, 196, 198. The court then decided that the defendant's constitutional claim was actually a due process claim, granting relief on the merits. *See id.* at 199-202.

In holding that the Speedy Trial Clause does not protect a criminal defendant's right to a speedy final disposition, the Second Circuit joined several state supreme courts that reached the same result. *See, e.g.*, *State v. Drake*, 259 N.W.2d 862, 866 (Iowa 1977), *overruled on other grounds by State v. Kaster*, 469 N.W.2d 671, 673 (Iowa 1991); *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010); *State v. Johnson*, 363 So. 2d 458, 460 (La. 1978); *Ball v. Whyte*, 294 S.E.2d 270, 271 (W. Va. 1982); *accord Moore v. United States*, 359 A.2d 299, 302 n.7 (D.C. 1976).

The Montana Supreme Court's decision below adopted the Second Circuit's reasoning. *See* Pet App. 13a-14a. To arrive at that holding, the court *rejected* its *own* 2006 decision in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), which "'conclusively [held] that the right to a speedy trial applies through sentencing,'" *See* Pet. App. 7a, 15a (alteration in original) (quoting *Mooney*, 137 P.3d at 535).

B. The Split Is Intractable.

Without this Court's intervention, lower courts will remain divided on the existence *vel non* of a speedy trial right at sentencing.

Federal and state courts have regularly acknowledged the split in authority. *See, e.g.*, *Carpenter*, 781 F.3d at 609; *Ray*, 578 F.3d at 192 & n.11; *Perez v. Sullivan*, 793 F.2d 249, 253 n.3 (10th Cir. 1986); *Pressley*, 223 P.3d at 301; *Johnson*, 363 S.2d at 460; *Drake*, 259 N.W.2d at 865-66. Nor is this a disagreement that is likely to resolve itself. Many of the courts that have recognized Sixth Amendment protections at sentencing adhere to their precedent, rather than revisiting the issue, when the issue again arises. Earlier this year, for example, the First Circuit explicitly "decline[d] to adopt" the Second Circuit's reasoning in *Ray*. *Carpenter*, 781 F.3d at 609-10. In electing to continue to retain its precedent, the court explained that it saw "no reason to depart from the majority view that assumes that the Sixth Amendment also protects against post-trial delay." *Ibid.* This reflects the view taken by "the lower federal courts" that *Pollard* provides "'strong indication' that the sixth amendment has application to the time between conviction and sentencing." *McLellan*, 498 A.2d at 740 (Souter, J.).

Courts on the other side of the split have also dug in their heels. For example, in declining to revisit its holding that the Sixth Amendment does *not* protect against sentencing delays, the Kansas Supreme Court explained that "absent a ruling from the United States Supreme Court explicitly extending speedy

trial protections to sentencing, we see no reason to change course." *Pressley*, 223 P.3d at 302.

The persistence of the disagreement across state and federal jurisdictions shows the need for intervention by this Court. Nor does the fact that the court below switched sides and reversed itself offer hope that the lower courts will come to some consensus. The opposing sides of the debate have been joined, and their reasoning explicated: they simply disagree about whether "the harms arising from delayed sentencing" are or are not "different from those animating the Speedy Trial Clause." *Ray*, 578 F.3d at 198.

II. The Question Whether the Sixth Amendment Attaches Through Final Disposition Is Important.

The Sixth Amendment's right to a speedy trial "is one of the most basic rights preserved by our Constitution," with "its roots at the very foundation of our English law heritage." *Klopfer*, 386 U.S. at 223, 226. Resolving the split over the scope of the Speedy Trial Clause is crucial because (1) sentencing delays inflict the same kind of harm on defendants as delays before trial; and (2) relying on the Due Process Clause to protect defendants subjects defendants to a burdensome and unjustified prejudice requirement.

1. There is a pressing need to protect defendants' Sixth Amendment right to a speedy sentencing.

The speedy trial right serves three primary interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See Barker v. Wingo*, 407 U.S. 514, 532 (1972); *McLellan*, 498 A.2d at 739.

These interests remain after conviction, given "that indefinite incarceration could exceed the length of a fair sentence; that extended and indefinite uncertainty about disposition could destroy the opportunity for a defendant to perceive a fair relationship between guilt and penalty; and that delay in completing the trial process could prejudice both the State and the defendant if a retrial should be ordered on appeal." *McLellan*, 498 A.2d at 739; *see Carpenter*, 781 F.3d at 609-10. Indeed, without a sentence, the defendant remains in stasis and cannot appeal, seek clemency or commutation, or move the case forward in any way. *See Burkett v. Fulcomer* (*Burkett II*), 951 F.2d 1431, 1443 (3d Cir. 1991).

Furthermore, sentencing delays have damaging practical consequences. Defendants awaiting sentencing, like pretrial defendants, are often held in local jails. Compared to state prisons, jails are more dangerous, have fewer financial resources, are less able to care for inmates' physical and mental health, and provide limited educational or rehabilitative programming. *See* Cindy Chang, *Prison Re-Entry Programs Help Inmates Leave the Criminal Mindset Behind, but Few Have Access to the Classes*, The Times-Picayune, May 19, 2012, http://www.nola.com/crime/index.ssf/2012/05/prison_re-entry_programs_help.html (re-entry programs in Louisiana state prisons were unavailable for the majority of Louisiana inmates in local custody); Amanda Petteruti & Nastassia Walsh, Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies (Justice Policy Institute, April, 2008), 5, http://www.justicepolicy.org/images/upload/08-

04_REP_JailingCommunities_AC.pdf; Robert G. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 Ky. L.J. 1, 15-16 (2007); Human Rights Watch, Ill-Equipped: U.S. Prisons and Offenders with Mental Illness 16 (2003), http://www.hrw.org/reports/2003/usa1003/usa1003.pdf; Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1685-87 (2003).

This lack of educational and rehabilitative programs does not merely affect the conditions of confinement, but also can obstruct defendants' efforts to seek parole. In Kentucky, for example, educational and rehabilitative programs are far more accessible at state prisons than in local jails, and in 2007 "a state inmate in jail [was] three to four times more likely to get a serve-out order [to serve the entirety of a sentence] than [was] a state inmate in prison." Lawson, *Turning Jails into Prisons*, *supra*, at 42. This is logical; parole boards often consider involvement in programming and preparation for integration into the community. *See, e.g.*, N.Y. Exec. Law § 259-i(2)(c)(A)(i) (McKinney) (requiring New York's Board of Parole to consider institutional performance and academic, vocational, and therapy achievements). Betterman himself was required to complete specific programs that were not available at the local detention center in which he was held. Affidavit of Defendant at 2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Defendants facing inordinate sentencing delays are therefore not subject to mere inconveniences, but are deprived of opportunities for rehabilitation and of resources that could enable them to reduce their time in custody.

2. When the Montana Supreme Court rejected the applicability of the Sixth Amendment to sentencing delays and instead analyzed the delay under the lens of due process, it saddled Betterman with the unjustified burden of proving actual prejudice.

The four-factor *Barker v. Wingo* balancing test for Sixth Amendment speedy trial claims requires courts to weigh the length of the delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and whether the defendant has been prejudiced by the delay. 407 U.S. at 530. Because these factors must be "considered together with such other circumstances as may be relevant," no one factor is dispositive, and a showing of prejudice is not a strict requirement. *Id.* at 533. The Montana Supreme Court, adopting the Second Circuit's approach, applied the two-pronged *Lovasco* due process test. That test assesses only: "[1] the reasons for the delay as well as [2] the prejudice to the accused." Pet. App. 17a (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)); *see also Ray*, 578 F.3d at 199.

The *Lovasco* test *requires* an affirmative showing of prejudice. *See Lovasco*, 431 U.S. at 790; *Ray*, 578 F.3d at 199. The Montana Supreme Court faithfully applied this test, denying Betterman relief from "unacceptable" delay because it found no "substantial and demonstrable" prejudice. Pet. App. 22a. But this squarely contradicts *Barker*. *Barker* made clear that no one factor is "a necessary or sufficient condition," and that evaluating the factors requires "a difficult and sensitive balancing process." 407 U.S. at 533.

Since *Barker*, this Court has repeatedly rejected an affirmative prejudice requirement for speedy trial claims. In *Moore v. Arizona*, this Court stated: "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." 414 U.S. 25, 26 (1973). This Court reinforced this understanding in *Doggett v. United States*, finding error where a court had rejected a speedy trial claim because the defendant made no affirmative showing of prejudice. 505 U.S. 647, 655 (1992). This Court emphasized that "consideration of prejudice is not limited to the specifically demonstrable," and "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Ibid.*; *see also Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J., concurring) ("I do not read the Court's opinion as deciding that in post-*Klopfer* cases ... [the defendant] must prove actual prejudice ....").

The Due Process Clause, with its concomitant requirement of proving actual prejudice, inadequately protects a defendant's constitutional right to a speedy disposition. An affirmative prejudice requirement hobbles any defendant challenging a sentencing delay, as the "burden to show actual prejudice is heavy and is rarely met." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (applying *Lovasco* to a pre-indictment delay). The burden is especially heavy because speedy trial prejudice "is not always readily identifiable." *Barker*, 407 U.S. at 531-32. The damage is worst where the prejudice suffered by a defendant is the impairment of evidence needed in later proceedings, which represents both the "most

serious" form of prejudice, *id.* at 532, and "the most difficult form of speedy trial prejudice to prove," *Doggett*, 505 U.S. at 655.

The disparate constitutional tests applied by the lower courts means similarly-situated defendants enjoy widely different protections against sentencing delay. As the law stands now, a defendant in federal court in New Jersey challenging the delay between conviction and sentencing need not necessarily make an affirmative showing of "substantial and demonstrable" prejudice to succeed, but a defendant in federal court in New York must. *See Ray*, 578 F.3d at 200; *see generally Burkett I*, 826 F.2d at 1219-21. Criminal defendants facing proceedings in Louisiana state court cannot rely on the more defendant-friendly *Barker* test to successfully challenge an unconstitutional sentencing delay, while defendants in Louisiana federal court can. *See Johnson*, 363 So. 2d at 460-61; *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976).

III. This Case Is An Ideal Vehicle For This Court To Resolve This Issue.

The Court denied certiorari on this question in *Ray v. United States*, 559 U.S. 1107 (2010) (No. 09-7778). But *Ray* was an extremely poor vehicle for addressing the question, because the defendant in *Ray* had already received relief under the Due Process Clause. *See* 578 F.3d at 202-03 (vacating the defendant's sentence). The decision below, by contrast, presents a good opportunity to address the question presented, because the question is outcome-determinative. The Montana Supreme Court held that Betterman cannot prevail under the *Lovasco* Due Process Clause test.

Pet App. 17a, 22a-23a. But Betterman *can* prevail under the *Barker* Speedy Trial Clause test.

The first *Barker* factor, the length of the delay, weighs heavily in Betterman's favor. Betterman experienced a fourteen-month delay between conviction and sentencing. A delay of one year is "presumptively prejudicial" and "unreasonable." *See Doggett*, 505 U.S. at 652 n.1. The court below acknowledged that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a.

The second *Barker* factor, the reason for the delay, also weighs heavily in Betterman's favor. The court below found that the delay was primarily "institutional," and that there was "no fault in Betterman for this delay, especially in light of his requests to be sentenced." *Id.* at 20a-21a. It took the government an inexplicable five months to prepare a presentence report. *Id.* at 3a. It took the sentencing court two months simply to schedule a hearing. *Ibid.* The Montana Supreme Court called this dual delay "inordinate." *Id.* at 20a. As the court recognized, "no legitimate reason has been set forth for such a delay." *Ibid.*

The third *Barker* factor, "[t]he defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32. This factor also weighs heavily in Betterman's favor. While waiting in jail for fourteen months, Betterman persistently asserted his right to be speedily sentenced. In January 2013, after waiting nearly nine months to be sentenced, Betterman

filed a motion to dismiss on speedy trial grounds. Pet. App. 3a. The court did not hold a hearing but nevertheless took three months to deny the motion. *Ibid.* In March 2013, Betterman asserted his right a second time by requesting a sentencing hearing. The court replied that it was too busy with civil matters and would not be able to "fast track" the sentencing. *Id.* at 3a-4a. In May 2013, more than a year after pleading guilty, Betterman filed a motion for reconsideration of the court's denial of his motion to dismiss, and an affidavit explaining exactly how the delay was prejudicing him. *Id.* at 4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27. The court denied Betterman's motion to reconsider its prior decision. *See* Pet. App. 24a-25a. In short, Betterman did everything he possibly could to assert his right to speedy sentencing.

The fourth *Barker* factor is prejudice to the defendant. While the Montana Supreme Court rejected Betterman's showing of prejudice under the Due Process Clause's more demanding *Lovasco* standard, Betterman can easily show sufficient prejudice under *Barker*, particularly in light of how strongly the other three *Barker* factors weigh in his favor. As Betterman explained to the court, while waiting to be sentenced, he lost an opportunity for conditional release; an arrest warrant was issued in another county because of his inability to serve out that sentence; he was prevented from completing a court-ordered treatment program; and he was denied access to treatment for his medical issues, including his worsening degenerative disc disease in his back.

The choice of test—*Barker* or *Lovasco*—will determine the outcome of this case. The case is on direct

appeal, and the question is clearly preserved and cleanly presented. There could not be a better vehicle for addressing the question presented.

IV. The Montana Supreme Court's Decision Is Incorrect.

The Montana Supreme Court's opinion contravenes this Court's precedents. In refusing to apply speedy trial protections at sentencing, it misconstrues the right's history and grounding principles.

The Montana Supreme Court concluded that the Founders understood a "trial" to encompass only the jury's determination of guilt, while "judgment" or "sentence" would be the province of the judiciary and therefore separate from a "trial." *See* Pet. App. 8a-10a. But the Founders' understanding of the jury trial was characterized by the "invariable linkage of punishment with crime." *See Apprendi*, 530 U.S. at 478-79 (citing 4 Blackstone 369-370). "[S]entencing usually occurred simultaneously or almost simultaneously with the verdict." Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771, 1830 n.266 (2003). Accordingly, trial *determined* sentence: for a defendant's purposes, the two were one and the same. Treating sentencing as wholly distinct from trial, and suspending a defendant's sentencing for months or years after a verdict, would have been entirely foreign to this system.

In deeming speedy trial concerns irrelevant at sentencing, the Montana Supreme Court fundamentally misunderstood the interests underlying that right. The court concluded that sentencing delay cannot impair an accused's defense

or ability to argue for leniency at sentencing. *See* Pet App. 12a. This overlooks the possibility that delay in sentencing may prejudice the defendant's ability to present evidence at retrial if a defendant's conviction is overturned—a process that itself cannot begin until the defendant is sentenced. *See Gonzales*, 582 P.2d at 633. Delay may also harm the defendant's ability to put on evidence at sentencing to prove mitigating factors or challenge the application of sentencing enhancements. *See ibid.*; *Jolly*, 189 S.W.3d at 48; *State v. Allen*, 505 N.W.2d 801, 803 (Wis. App. 1993).

Additionally, prolonged sentencing delays can cause significant anxiety on the part of a convicted defendant, especially when sentencing is potentially a life or death determination. *See Brady*, 443 F.2d at 1312 (recognizing that a portion of a sentencing delay "was a period of unjustified anxiety" regarding whether the defendant would receive a capital sentence); *Allen*, 505 N.W.2d at 803. As Betterman explained to the trial court, he had sought out counseling for "the anxiety and depression caused by the uncertainty" he faced from his sentencing delays. Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Excluding sentencing from the speedy trial right fails to account for such harm to the defendant's mental well-being.

Finally, the Montana Supreme Court incorrectly relied on the assumption that the sole remedy for a speedy trial violation is dismissal of the charges. The court determined that applying this remedy for a sentencing delay "conflict[s]" with *Bozza*, which it interpreted to mean that a defendant should not go off scot-free due to a court's "error in passing sentence." Pet. App. 14a (quoting *Bozza*, 330 U.S. at 166-67).

But *Bozza* involved a double jeopardy claim, not a speedy trial right violation. *Bozza*, 330 U.S. at 166. Furthermore, it is far from clear that dismissal is the exclusive remedy for a speedy trial violation based on sentencing delay, and several courts have applied alternative remedies under the Sixth Amendment. *See Burkett II*, 951 F.2d at 1447-48 (reducing defendant's sentence); *Juarez-Casares*, 496 F.2d at 191 (vacating sentence); *Jolly*, 189 S.W.3d at 49 (same); *Trotter*, 554 So. 2d at 319 (same); *State v. Rich*, 248 P.3d 597, 601 (Wash. Ct. App. 2011) (remanding for imposition of the standard range to which defendant would have been entitled had he been sentenced before intervening change in the law).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 10, 2015

APPENDIX A

SUPREME COURT OF MONTANA

No. DA 13-0572

STATE OF MONTANA, PLAINTIFF AND APPELLEE,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT AND APPELLANT

Feb. 10, 2015

Appeal From District Court,
Second Judicial District

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Appellant Brandon Thomas Betterman appeals the judgment of conviction and sentence for the

offense of bail jumping, arguing that a 14-month delay between entry of his guilty plea and sentencing was a violation of his right to a speedy trial. The District Court denied his motion to dismiss for lack of speedy trial. We affirm, but upon a basis different from that reached by the District Court.

¶2 We restate the issue as follows:

> *Was Betterman denied due process of law by virtue of the delay occurring between his conviction and sentencing?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Pursuant to charges of felony partner or family member assault, Betterman was ordered to appear in court on December 8, 2011. Betterman failed to appear on December 8, 2011, and again on December 9, 2011, after the court continued the matter for a day. A warrant was issued for Betterman's arrest.

¶4 On February 9, 2012, Betterman turned himself in to the Butte-Silver Bow Detention Center. He wrote a letter to the District Court dated February 27, 2012, admitting that he knew he was due in court on December 8, 2011, but that he had neither transportation nor money to travel from Billings. Betterman was charged with bail jumping on March 5, 2012.

¶5 Betterman was sentenced for the underlying partner or family member assault conviction on March 15, 2012. He was given five years to the Department of Corrections (DOC), with two years suspended, and credit for time served. Betterman was remanded to the Butte-Silver Bow Detention Center pending his arraignment on the bail jumping charges.

¶6 At his arraignment on April 19, 2012, for the

bail jumping charges, Betterman pleaded guilty. The State also filed its notice that it intended to designate Betterman as a persistent felony offender. Betterman objected to the State's notice on April 27, 2012, and the District Court held a hearing on June 28, 2012. At the conclusion of the hearing, the court took the matter under advisement and remanded Betterman to Butte-Silver Bow Detention Center to await sentencing on his bail jumping conviction. On November 27, 2012, the District Court issued its order denying Betterman's objection to the State's PFO notice finding that Betterman was not prejudiced by the State's filing of the notice.

¶7 Following Betterman's plea of guilty on April 19, 2012, the District Court ordered an updated PSI on May 3, 2012. In its order, the District Court advised that a sentencing hearing would be scheduled upon receipt of the PSI. Nearly five months later, on October 10, 2012, the updated PSI was completed. Two months later, on December 28, 2012, the District Court scheduled a sentencing for January 17, 2013. On January 17, 2013, the day of sentencing, Betterman filed a motion to dismiss alleging he was denied a speedy trial because of the delay in his sentencing. The State requested time to respond, and filed its response on January 29, 2013. A hearing was never held and the District Court issued a written order on April 29, 2013, denying Betterman's motion pursuant to an *Ariegwe* analysis. *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815.

¶8 Meanwhile, apparently concerned about the delay in scheduling a sentence, the State and Betterman notified the District Court in March of 2013 that they wanted a sentencing hearing scheduled. They were told by the District Court's Judicial Assistant that there were several civil orders

that were pending and that the court would not be able to "fast track" the sentencing.

¶9 On May 6, 2013,[1] Betterman filed an Affidavit with the court setting forth the following: that he had spent at least 442 days at Butte-Silver Bow Detention Center for the partner or family member assault and would otherwise be eligible for conditional release if he had actually been an inmate with the DOC; that a warrant was issued in another county because he was not able to complete portions of that sentence due to his confinement on the bail jumping; that, while he completed Anger Management in the Butte-Silver Bow Detention Center, he was unable to complete Cognitive Principles and Restructuring (CPR), or obtain chemical dependency counseling and a mental health assessment as required by the sentence imposed for the partner or family member assault; that he desires a hearing on his motion to dismiss and, in any event, at least a sentencing; that he is unemployed and cannot continue any schooling; that he has anxiety and depression as a result of the delay; and that he has not received medical attention for high blood pressure, stomach, and back problems.

¶10 The matter was finally scheduled for sentencing on June 27, 2013. For the offense of bail jumping, Betterman received a sentence of seven years to the Montana State Prison, with four years suspended. The sentence was ordered consecutive to his five year sentence for partner or family member assault.

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[1] Given the date stamp of Betterman's affidavit, it does not appear the District Court had the opportunity to consider it prior to issuing its order denying Betterman's motion to dismiss.

STANDARDS OF REVIEW

¶11 The denial of a motion to dismiss in a criminal case presents a question of law, which this Court reviews de novo. *State v. Nickerson*, 2014 MT 83, ¶ 6, 374 Mont. 354, 322 P.3d 421. A trial court's interpretation and application of the law or constitution are reviewed de novo to determine if the conclusions are correct. *Ariegwe*, ¶ 119. Underlying findings of fact are reviewed under the clearly erroneous standard. *Nickerson*, ¶ 6. The court's findings of fact are clearly erroneous if not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Ariegwe*, ¶ 119. The Court will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason. *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646.

DISCUSSION

¶12 *Was Betterman denied due process of law by virtue of the delay occurring between his conviction and sentencing?*

¶13 This appeal requires us to address the nature of a defendant's right to be sentenced in a timely fashion. Betterman, relying on *State v. Mooney*, 2006 MT 121, 332 Mont. 249, 137 P.3d 532, *overruled in part by Ariegwe*, ¶ 102 n. 9, and *Ariegwe*, argues that he has a speedy trial right, deriving from the Sixth Amendment of the United States Constitution and Article II, Section 24, of the Montana Constitution, which includes the period from the date of his guilty plea until the date of his sentencing. Betterman maintains that the District Court incorrectly

determined that his guilty plea waived any constitutional claims arising thereafter, and argues that he waived only the right to raise constitutional claims "which may have occurred prior to the plea." *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104. Betterman evaluates his sentencing delay by applying the speedy trial analysis we stated in *Ariegwe*.

¶14 The State contends that Betterman waived his right to argue a speedy trial violation when he pleaded guilty. The State reasons that because there is no further right to a trial after a guilty plea, there is similarly no further right to the constitutional protections associated with a trial. The State argues that the speedy trial right ends upon a finding of guilt by verdict or plea, which is the date of "disposition" for purposes of a speedy trial claim. The State argues that if this Court considers the merits of Betterman's sentencing delay, we should apply due process considerations of the Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution, and not the "ill-fitting" *Ariegwe* analysis.

¶15 The State maintains that the due process analysis it urges is consistent with the multiple statutory provisions requiring sentencing to take place without unreasonable delay. However, the State points out that Betterman has waived review under these more appropriate bases because he has not made a statutory claim and has asserted a constitutional speedy trial violation rather than a due process violation. Regardless of the analytical approach employed, the State urges us to find that the delay was reasonable because each instance of delay was associated with motions filed by Betterman.

¶16 Upon our review of the record, we agree that Betterman has failed to articulate in either the District Court or this Court any statutory claim of sentencing delay. We will not consider an issue raised for the first time on appeal or a party's change in legal theory. *State v. Dewitz*, 2009 MT 202, ¶ 30, 351 Mont. 182, 212 P.3d 1040. We therefore consider only Betterman's constitutional claim of sentencing delay.

¶17 In our single decision addressing whether the right to a speedy trial includes sentencing, we determined that sentencing was part of trial for purposes of the Sixth Amendment and "conclusively [held] that the right to speedy trial applies through sentencing." *Mooney*, ¶ 15. We arrived at this conclusion, however, without analysis or explanation and in apparent reliance on *Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 486 (1957). In *Pollard*, the Supreme Court stated that it would "assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment." 352 U.S. at 361, 77 S.Ct. at 486. Applying both the Sixth Amendment and Fed. R. Crim. P. 32(a) (1946), it then denied the speedy sentencing claim on the merits, finding that the delay was not "purposeful or oppressive" and the sentencing delay was promptly remedied when discovered. *Pollard*, 352 U.S. at 362, 77 S.Ct. at 486. Although we similarly denied Mooney's speedy trial claim on the merits, *Mooney*, ¶¶ 16-17 we went further than the assumption "*arguendo*" in *Pollard* and actually held that the right to speedy trial applies to sentencing.[2] Given our

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[2] Many courts have adopted the same approach as *Pollard* to evaluating the question—that is, assuming the right exists through sentencing and then denying the claim on the merits.

reliance upon *Pollard* to extend the constitutional speedy trial right to include sentencing when *Pollard* refrained from recognizing it as such, we deem it appropriate to reexamine the nature of a claim of sentencing delay.

¶18 We begin by observing the distinction between trial, to which a constitutional speedy trial right clearly attaches, and sentencing. In *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356 (2000), the Supreme Court retraced the Sixth Amendment jury trial right and the principle that an accused is entitled to have each of the facts substantiating an element of the crime tried before a jury. In so doing, it examined the relationship between a trial by jury and judgment by court as it existed during the years surrounding our nation's founding. "'After trial and conviction are past,' the defendant is submitted to 'judgment' by the court—the stage approximating in modern times the imposition of sentence." *Apprendi*, 530 U.S. at 478 n. 4, 120 S.Ct. at 2356 n. 4 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 368 (1769)). The *Apprendi* Court explained that "trial by jury has

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See United States v. Gibson, 353 F.3d 21, 27 (D.C. Cir. 2003) ("Assuming . . . without deciding that the guarantee of a 'speedy and public trial' also provides a defendant a right to be promptly sentenced, we hold that [the defendant] has failed to make the showing under *Barker* necessary to obtain relief."); *United States v. Yelverton*, 197 F.3d 531, 535 (D.C. Cir. 1999) ("Neither the Supreme Court nor this court has held that the Sixth Amendment right to a speedy trial reaches sentencing, but in [*Pollard*], the Supreme Court assumed that it did."); *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988) ("This court has treated the imposition of sentence as within the speedy trial guarantee, but has refrained from explicitly recognizing it as such.").

been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve [of the defendant's] equals and neighbours . . . .'" *Apprendi*, 530 U.S. at 477, 120 S.Ct. at 2356 (quoting Blackstone, *supra*, at 343). Sentencing, however, followed the verdict, and "'there may be no doubt as to the judgment which should be given, if the defendant be convicted.'" *Apprendi*, 530 U.S. at 478, 120 S.Ct. at 2356 (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)).[3] The distinction is again explained by the Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 308-09, 124 S.Ct. 2531, 2540 (2004): The "jury's traditional function of finding the facts essential to lawful imposition of the penalty" derives from the Sixth Amendment, which "by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." Consistent with these principles separating the trial establishing guilt from the imposition of penalty, many jurisdictions prohibit a jury from knowing the penalty a criminal defendant may face in the event of a guilty finding.[4]

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[3] The substantive criminal law during this time period tended to be sanction-specific, thus prescribing a specific sentence of each offense with little discretion left to the judge in imposing a sentence. *Apprendi*, 530 U.S. at 479, 120 S.Ct. at 2357.

[4] *See State v. E.M.R.*, 2013 MT 3, ¶ 24, 368 Mont. 179, 292 P.3d 451 ("'providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.'") (quoting *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424 (1994)); *State v.*

¶19 These distinctions drawn by the Supreme Court are mirrored in Montana's statutory scheme which separates the trial phase of a criminal prosecution from the penalty or sentencing phase. "All prosecutions deciding issues of *fact* must be *tried* by the court and jury . . ." and "[a]ll *sentences* . . . shall be imposed exclusively by the *judge* of the court." Sections 46-16-103, 46-18-103, MCA, (emphases added). Indeed, "sentence" is defined in our Code as "the judicial disposition of a criminal proceeding upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty." Section 46-1-202(25), MCA. Finally, *Black's Law Dictionary* defines "trial" as the "formal judicial examination of evidence and determination of legal claims in an *adversary* proceeding"; while a sentence is the "judgment that a court formally pronounces *after* finding a criminal defendant guilty . . . ." *Black's Law Dictionary* 1569, 1735 (Bryan A. Garner ed., 10th ed. 2014) (emphases added).

¶20 These distinctions are important because the constitutional provisions themselves expressly identify the protections due in the context of a "*trial*." "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. Similarly, in Montana: "In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury . . . ." Mont. Const., art. II, § 24. Hence, the historical meaning of the word "trial" is significant in ascertaining whether "trial," as it is

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Zuidema, 157 Mont. 367, 373, 485 P.2d 952, 955 (1971) ("punishment is not of [the jury's] concern."); 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 521, 77 (4th ed. 2011).

used within the Speedy Trial Clause, includes sentencing.

¶21 The Supreme Court, as well as this Court in *Ariegwe*, has made clear the interests the constitutional speedy trial right is designed to protect. In *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, (1971), the Supreme Court explained:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

In *Barker v. Wingo*, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193 (1972), the Court continued to define "prejudice" to the defendant and explained that prejudice should be evaluated in relation to the interests the Speedy Trial Clause is designed to protect:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and

> (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Where the Sixth Amendment is inapplicable, such as when charges are dismissed or disposed of, the Supreme Court has observed that the "interest is protected primarily by the Due Process Clause . . . ." *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 497, 1502 (1982).

¶22 When considering the interests protected by the constitutional speedy trial right, it is manifest that the interests are different from those of a convicted defendant in being sentenced without delay. Primarily, an accused's defense cannot be impaired once he has been convicted.[5] The passage of time that may impair a defense, such as loss of exculpatory evidence or death of a material witness, does not undermine a criminal defendant's ability to argue leniency at sentencing. *See United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) ("[W]hen all that remains of a case is the imposition of a sentence, the danger of losing witnesses or other evidence needed to mount an adequate defense is minimized, if not eliminated completely."). Further, one who has been convicted of a crime does not share the same anxiety and concern as one accused of a crime. The anxiety and concern of one who has been accused arises from the cloud of suspicion cast over a

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[5] Of course, no appeal would lie until final judgment, attained upon imposition of sentence. Here, a claim of impairment through delay of an appeal has not been advanced and we will not speculate as to that analysis or outcome.

person who is presumptively innocent. *Klopfer v. North Carolina*, 386 U.S. 213, 222, 87 S.Ct. 988, 993 (1967). When the defendant is convicted, his presumption of innocence no longer exists. While he may still be under a cloud, it is not a cloud of "public accusation," *Klopfer*, 386 U.S. at 222, 87 S.Ct. at 993, but a cloud of public guilt generated by a finding beyond a reasonable doubt that he did commit the alleged crimes, *Erbe v. State*, 336 A.2d 129, 136 (Md. Ct. Spec. App. 1975). Finally, there is no risk of oppressive pre-trial incarceration once a defendant is convicted of an offense. When a defendant is detained prior to conviction, he remains cloaked with the presumption of innocence. Our concern is that a person presumed innocent is nevertheless deprived of his liberty. However, a guilty plea, guilty verdict, or findings made by the court extinguishes this concern and we no longer are considering an accused, but someone who has been convicted of a crime.

¶23 A delayed sentencing raises different concerns than those raised by a delay in proceeding to trial. A delay in sentencing "may leave the defendant, as well as the victim, in limbo concerning the consequences of conviction. It postpones the commitment of the defendant to corrections facilities, may have a detrimental effect on rehabilitation, and suspends the appellate review of error." Wright & Welling, *supra*, § 524 at 91. We believe these concerns are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial. We realize that a criminal prosecution encompasses sentencing and that the prosecution does not terminate until sentence is imposed. However, this proposition has no bearing on when a trial terminates. "Trial" is not synonymous with "prosecution." A prosecution is made up of many

phases: investigation, pre-trial (arraignment, motions), adjudication, and post-trial (sentencing). *See United States v. Ray*, 578 F.3d 184, 198 (2d Cir. 2009).

¶24 Significantly, if we were to extend the constitutional right to speedy trial to include sentencing, there would be the question of what remedy to impose when the delay occurred subsequent to conviction. The only remedy available for a constitutional speedy trial violation is the dismissal of the charges. The Supreme Court made clear in *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263 (1973), that "dismissal [is] the only possible remedy" for a violation of the right protected by the Speedy Trial Clause. Although recognizing this remedy was "unsatisfactorily severe," the Court found it necessary because of the irreparable harm caused by violation of the right. *Strunk*, 412 U.S. at 439-40, 93 S.Ct. at 2263. This contrasts with the remedy for a sentencing error, which rejects the doctrine that a prisoner "'whose guilt has been established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*, 330 U.S. 160, 166-67, 67 S.Ct. 645, 649 (1947) (quoting *In re Bonner*, 151 U.S. 2472, 260, 14 S.Ct. 323, 327 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166, 67 S.Ct. at 649. If the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges.

See Ray, 578 F.3d at 193-94.

¶25 Based on the foregoing, we conclude that, just as the right to speedy trial does not attach until a criminal proceeding has been initiated, *United States v. Lovasco*, 431 U.S. 783, 788, 97 S.Ct. 2044, 2048 (1977), or after charges have been dismissed, *MacDonald*, 456 U.S. at 10, 102 S.Ct. at 1503, so too does it cease to apply when the conviction becomes definitive. We determine that the major concerns of the speedy trial right guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution do not apply after conviction. Furthermore, to the extent that *Mooney* holds that a constitutional speedy trial right applies through sentencing, it is overruled. Any prejudice suffered by a criminal defendant as a result of an unreasonable delay in sentencing must find its remedy in an alternative constitutional or statutory provision.

¶26 Because we find the Sixth Amendment inapplicable, Betterman's interest in being sentenced without unreasonable delay is "protected primarily by the Due Process Clause . . . ." *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. Although the State argues Betterman did not raise issues of constitutional due process in the District Court, and thus has waived consideration of those issues on appeal, we will not fault Betterman for his reliance on *Mooney*, which established, although we determine today incorrectly, that the Sixth Amendment right to a speedy trial continues through to sentencing. Thus, we will consider Betterman's constitutional claim pursuant to a due process analysis.

¶27 Due process of law requires that "[n]o person shall be deprived of life, liberty, or property without

due process of law." Mont. Const. art. II, § 17; *see also* U.S. Const. amend. XIV. This Court has held that a criminal defendant's sentence must comport with the due process guarantees of these constitutional provisions. *State v. Haldane*, 2013 MT 32, ¶ 40, 368 Mont. 396, 300 P.3d 657. The Due Process Clause protects defendants against fundamentally unfair treatment by the government in criminal proceedings. The Supreme Court, moreover, has recognized that the Due Process Clause has "a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789, 97 S.Ct. at 2048. A delay in sentencing that violates these fundamental guarantees can, depending on the circumstances, constitute a violation of the Due Process Clause.

¶28 Reasonable timeliness of sentencing is a due process guarantee expressed by the Montana Legislature in several statutory provisions. Section 46-18-101(3)(a), MCA, provides: "Sentencing and punishment *must* be certain, *timely*, consistent, and understandable." (Emphasis added.) Section 46-18-102(3)(a), MCA, provides: "if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a *reasonable* time." (Emphasis added.) Section 46-18-115, MCA, provides: "the court shall conduct a sentencing hearing *without unreasonable delay* . . . ." The 1991 Commission Comments clarify that this statute "mainly embodies due process constitutional law that has been developed in federal courts and the Montana Supreme Court." 2014 Annotations to the MCA, vol. 10 at 842. We find that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings guaranteed by the Due Process Clause, protects a criminal defendant from

unreasonable delay between conviction and sentencing.[6]

¶29 Whether there has been unreasonable sentencing delay "depends upon the circumstances" of each case. *Pollard*, 352 U.S. at 361, 77 S.Ct. at 486. However, in order to determine whether a defendant has been deprived of his constitutional right of due process through a delayed sentencing, courts generally consider (1) the reasons for the delay and (2) the prejudice to the defendant. *Lovasco*, 431 U.S. at 790, 97 S.Ct. 2049; *see also Sanders*, 452 F.3d at 580 ("Though the *Lovasco* line of cases addresses pretrial delays, we find it equally applicable to [delays in resentencing]. As in the time period before the *Sixth Amendment* right to a speedy trial attaches, the primary concern after the right ceases to apply is 'oppressive delay.'"). Under this test, "prejudice is . . . necessary but not sufficient" to prove a due process violation. *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2049. "[T]he due process inquiry must consider the reasons for delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790, 97 S.Ct. 2049; *see also United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) ("We have interpreted . . . *Lovasco* to hold that both conditions (improper reasons for delay and prejudice) are necessary for a due[ ]process violation.").

¶30 We believe, as we similarly found in *Ariegwe*, ¶¶ 101-02, that these considerations are not independent and should not be evaluated in isolation from each other. Rather, they are related factors to

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[6] As we previously observed, Betterman has failed to raise a statutory claim under code provisions mandating that a defendant be sentenced in a "timely" manner, without "unreasonable delay."

be weighed in light of each other and the surrounding circumstances. *See also Ray*, 578 F.3d at 199-200; *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986) (when considering sentencing delay, the pertinent "factors are to be balanced in light of the facts and circumstances of the case"); *cf. Barker*, 407 U.S. at 533, 92 S.Ct. 2193 (the factors relevant to a "finding of a deprivation of the right of speedy trial . . . are related factors and must be considered together with such other circumstances as may be relevant"); *United States v. L'Allier*, 838 F.2d 234, 238 (7th Cir. 1988) ("A court must . . . weigh the actual prejudice to the defendant against the reasons for the delay to determine whether a particular indictment must be dismissed pursuant to the due process clause. Thus, even if [the defendant] can show actual and substantial prejudice to his defense as a result of the sixteen month pre-indictment delay, the indictment will not be dismissed if there was a legitimate reason for the delay." (citation omitted)).

¶31 Our analysis of the reasons for the delay is informed by *Pollard*, which, in addition to assuming "*arguendo*" that a Sixth Amendment speedy trial right applied through sentencing, analyzed the provisions of Fed. R. Crim. P. 32(a) requiring imposition of sentence "without unreasonable delay." 352 U.S. at 361, 77 S.Ct. at 486. There, the Supreme Court declared that the "delay must not be purposeful or oppressive." *Pollard*, 352 U.S. at 361, 77 S.Ct. at 486. Subsequently, in *Barker*, those implied inquiries were amplified and articulated in the context of pre-trial delay. For example, the delay must not be deliberate or calculated to hamper the defense, gain a tactical advantage, or to harass the defendant. Such delay will be weighed heavily against the State; while more neutral reasons, such as negligence and

overcrowded courts, weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the State. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192; *see also Ariegwe*, ¶ 67. We observed in *State v. Good*, 2002 MT 59, ¶ 26, 309 Mont. 113, 43 P.3d 948, that the accused "cannot be held responsible for the court's policy regarding the setting of trial dates and its management of its criminal caseload." In *State v. Kipp*, 1999 MT 197, ¶ 14, 295 Mont. 399, 984 P.2d 733, we held that "[w]hen a trial court, for its own reasons, vacates the trial date and does not set a new date, this delay is not attributable to the defendant." Official negligence in bringing the defendant to trial occupies a middle ground between diligent prosecution and delay caused by bad faith. *Ariegwe*, ¶ 69. We have said that negligence in bringing the accused to trial is unacceptable delay. Finally, we must be mindful that in assessing the reasons for delay it is not the defendant's duty, or that of his attorney, to see that he is speedily prosecuted and sentenced. *Barker*, 407 U.S. at 527, 92 S.Ct. at 2190; *Ray*, 578 F.3d at 200.

¶32 Although we reject substantively the assumption in *Pollard* that the Speedy Trial Clause applies through sentencing, we find its analysis of sentencing delay instructive. Pursuant to *Pollard*, if a sentencing delay is purposeful and oppressive, then we must determine that there has been a constitutional due process violation. The determination of whether a delay is oppressive incorporates considerations of whether the defendant has suffered prejudice and the degree and nature of that prejudice. Neither factor is to be considered dispositive. Though the reasons for a delay may be less than purposeful, or the prejudice caused by the

delay less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. Each case requires an independent analysis with consideration of all the circumstances.

¶33 Betterman was convicted on April 19, 2012, when he pleaded guilty. He was not sentenced until fourteen months later, on June 27, 2013. During that time frame, he filed two motions: one objecting to the State's notice of PFO filed at the time he pleaded guilty, and a motion to dismiss for his sentencing delay. The time taken by the State in responding to these motions amounted to only a few months. The rest of the delay is attributable to obtaining the PSI and the District Court's delay in ruling on the motions and in scheduling the sentencing. Here, most of the delay must be considered institutional, since it is neither a deliberate attempt by the State to delay for purposes of hampering the defense, nor can the delay be overlooked. We note that both motions filed by the defense raised legitimate issues, especially the motion requesting dismissal for reasons of delay. The State does not allege that Betterman acted deliberately to delay his sentencing or that he made excessive or frivolous filings. Moreover, Betterman's actions in filing his two motions did not contribute greatly to the delay. Preparation of the PSI and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State. In short, there was unacceptable delay when it took fourteen months following conviction to sentence Betterman. While not purposeful, no legitimate reason has been set forth for such a delay. We further note that, pursuant to § 46-16-101, MCA, "Prosecutions against defendants held in custody

must be disposed of in advance of prosecutions against defendants on bail unless for good cause the court shall direct an action to be tried out of its order." We find no fault in Betterman for this delay, especially in light of his requests to be sentenced.

¶34 In addressing prejudice to the criminal defendant through sentencing delay, we are compelled to first observe that a delay in sentencing frustrates the goals articulated by the Montana Legislature in its sentencing policy for the State. *See* § 46-18-101, MCA (sentencing policy is to "encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community"; to achieve this policy, sentencing is to be "certain, timely, consistent, and understandable."). Sentencing delay "disserves a basic notion that, once convicted, an offender should be able to serve his sentence and be done with it." *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978). A delay in sentencing or in the execution of a sentence interrupts the defendant's reintegration into the community and thus frustrates effective rehabilitation. Programs designed to facilitate reentry into the community may be less accessible or delayed. These are compelling reasons to require that sentencing be conducted promptly and without unreasonable delay.

¶35 With these observations in mind, we proceed to evaluate Betterman's constitutional claim of prejudice in the context of his status as a convicted felon, as we are required to do, noting that as the rights of society proportionately increase, the claims of prejudice must be substantial and demonstrable. *Ray*, 578 F.3d at 201; *Perez*, 793 F.2d at 256; *State v. Todisco*, 6 P.3d 1032, 1040 (N.M. Ct. App. 2000).

Most of Betterman's claims of prejudice are speculative, concerning anticipated benefits or participation in various DOC programs, anticipated dates for conditional discharge, and anticipated enrollment in rehabilitation services. It appears as well that Betterman may have had a DUI matter in another county to attend to before acquiring "inmate" status and access to these benefits. There must be some showing of a causal relationship between the delay and the prejudice claimed. *Brooks v. United States*, 423 F.2d 1149, 1153 (8th Cir. 1970). Furthermore, post-conviction, pre-sentence anxiety is briefly alluded to by Betterman; the anxiety of an accused is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be.

¶36 On this record, we conclude that any prejudice to Betterman from a delayed sentencing was not substantial and demonstrable. In balancing the reasons for the delay together with the prejudice inuring to Betterman, we find that the delay was not purposeful or oppressive, but instead constituted institutional delay, which is nevertheless unacceptable. However, in light of the prejudice to Betterman, which was neither substantial nor demonstrable, we conclude that the unacceptable delay does not warrant finding a constitutional due process violation. We make no determination regarding whether Betterman was denied a timely sentence pursuant to Montana's statutory provisions, as he has not raised the issue.

CONCLUSION

¶37 We conclude that the constitutional right to

speedy trial does not extend from conviction to sentencing. However, a criminal defendant has a constitutional due process right to have sentence imposed in a timely manner, without unreasonable delay, embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution. A criminal defendant in Montana also has a statutory right to be sentenced promptly pursuant to §§ 46-18-101(3)(a), -102(3)(a), and -115, MCA. Because Betterman has failed to assert a statutory claim, we consider only his constitutional violation and make no determination regarding whether the same analysis would apply to review of a statutory claim of error. Although we find that the delay in Betterman's sentencing was unacceptable, we find that Betterman's prejudice from the delay was speculative and not substantial and demonstrable.

¶38 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ PATRICIA COTTER

/S/ JIM RICE

APPENDIX B

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 18, 2013.

ORDER DENYING MOTION TO RECONSIDER

KRUEGER, District Court Judge

This matter comes before the court on Defendant's motion to reconsider motion to dismiss. The Defendant requests the Court to reconsider its April 29, 2013 order denying a motion to dismiss on speedy trial grounds. As stated in the previous order, by

entering a guilty plea the Defendant affirmatively waived his right to contest the delay, the Defendant acquiesced in all other delays associated with this matter, and the defendant made no argument that that he was prejudiced by the delay. Accordingly the Court finds that the Defendant was not deprived of his right to a speedy trial.

Based on the forging, the Court accordingly hereby

ORDERS that the Plaintiff's motion to alter or amend judgment is *DENIED.*

DATED this 18 day of June, 2013.

/s/ Kurt Krueger

District Court Judge

APPENDIX C

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

Apr. 23, 2013.

ORDER DENYING MOTION TO DISMISS

KRUEGER, District Court Judge

INTRODUCTION

This matter comes before the Court on Defendant's motion to dismiss for lack of speedy trial filed on January 17, 2013. The State of Montana filed a brief in opposition to Defendant's motion on

January 29, 2013. After reviewing this matter, the Court now issues the following order denying Defendant's motion to dismiss for lack of speedy trial.

FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 2012, the State filed a complaint charging Defendant with the criminal offense of bail jumping, a felony in violation of Section 45-7-308, MCA. On March 15, 2012, in a separate matter, cause number DC-11-36, Defendant was sentenced to five years at the Department of Corrections with two years suspended and credit for time served on a charge of partner or family member assault - 3rd or subsequent offense, a felony in violation of Section 45-5-206(1)(a), MCA. On April 2, 2012, the Court granted leave for the State to file information charging Defendant with the felony offense of bail jumping in this matter. On April 19, 2012, Defendant appeared for arraignment on the bail jumping charge and entered a plea of guilty with a written waiver of rights. The Court accepted Defendant's guilty plea and ordered a presentence investigation report. Defendant purportedly entered a guilty plea at the arraignment to avoid being designated as a persistent felony offender ("PFO") under Section 46-18-501, MCA.

On April 19, 2012, following the arraignment and guilty plea, the State filed notice of intent to designate Defendant as a PFO at the time of sentencing. On April 27, 2012, Defendant filed a motion in opposition to PFO notice. On May 10, 2012, the State requested an extension of time to respond to Defendant's motion in opposition to PFO notice, noting Defendant was incarcerated on other charges and had no objection to the State's request for an extension of time. On June 13, 2012, the State

filed a response to Defendant's motion in opposition to PFO notice. On June 28, 2012, the Court held a hearing on Defendant's motion in opposition to PFO notice. At the conclusion of the June 28, 2012 hearing, the Court took the issue regarding PFO notice under advisement and remanded Defendant to incarceration pending sentencing in this matter.

On November 27, 2012, the Court issued an order denying Defendant's motion in opposition to PFO notice. The Court determined Defendant was not prejudiced by the State's filing of the PFO notice. On December 28, 2012, following the receipt of the presentence investigation report, the Court issued an order setting a sentencing hearing for January 17, 2013. Defendant appeared at the sentencing hearing with his attorney, Francis McGee. Deputy County Attorney Samm Cox appeared on behalf of the State. At the outset of the sentencing hearing, counsel for Defendant informed the Court that Defendant filed a motion to dismiss for lack of speedy trial earlier that day. The Court granted the State's request for additional time to respond to Defendant's speedy trial motion, and the State filed its response on January 29, 2013.

DISCUSSION

A defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. In *State v. Mooney,* the Montana Supreme Court held the right to speedy trial applies through sentencing. *State v. Mooney,* 2006 MT 121, ¶ 15, 332 Mont. 249, 137 P.3d 532 (*overruled on other grounds*). In *State v. Ariegwe,* the Montana Supreme Court set forth the framework for analyzing speedy trial claims and

adopted a four factor balancing test established by the United States Supreme Court. *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815 (citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). When analyzing a defendant's right to a speedy trial, the court must examine (1) the length of the delay, (2) the reason for the delay, (3) the defendant's response to the delay, and (4) prejudice to the defendant as a result of the delay. *Ariegwe*, at ¶ 20.

1. The Length of the Delay

Under factor one, the court first ascertains whether the interval between accusation and trial is at least 200 days (irrespective of fault for the delay). If the interval is less than 200 days, then further analysis is unnecessary. If the interval is at least 200 days, however, then the four-factor balancing test is triggered and the court must proceed with a full analysis. *Ariegwe*, at ¶ 107. The Montana Supreme Court determined the "interval between accusation and trial runs not to the date on which the accused's speedy trial motion is considered by the court but, rather, to the scheduled trial date or the date on which a plea of guilty is entered, whichever date represents the date of disposition of the case." *Ariegwe*, at ¶ 43. The Montana Supreme Court later determined it was necessary to clarify its statement from *Ariegwe* regarding the interpretation of the interval between accusation and trial. *State v. Pavey*, 2010 MT 104, ¶ 6, FN1, 356 Mont. 248, 231 P.3d 1104.

In *Pavey*, the defendant entered a plea of guilty with a written waiver of rights pursuant to a plea agreement with the State. Two days before the sentencing hearing, however, the defendant moved to

withdraw his guilty plea because his counsel had given him erroneous advice regarding the possibility of being designated as a persistent felony offender. The State did not oppose the defendant's motion to withdraw his guilty plea. Therefore, the district court granted the defendant's motion to withdraw his guilty plea and proceeded to schedule jury trial dates in relation to the charges against the defendant. The defendant subsequently filed motions to dismiss the charges against him claiming his constitutional right to a speedy trial was violated. *Pavey*, at ¶ 5-6.

The district court in *Pavey* denied the defendant's motion to dismiss for lack of speedy trial. The district court held the speedy trial clock stopped when the defendant entered his guilty plea and reset when the defendant was allowed to withdraw the guilty plea. The district court determined the interval between accusation (when the charge was filed) and the date the defendant entered his guilty plea was less than 200 days. Next, the district court determined the interval between the withdrawal of the guilty plea and the newly scheduled jury trial dates was less than 200 days. As such, the district court concluded the 200 day threshold under factor one of the *Arigwe* balancing analysis was not triggered and further analysis was unnecessary. *Pavey*, at ¶ 5-6. Following the denial of the defendant's motions to dismiss, the defendant reached another plea agreement with the state and entered a second plea of guilty with a written waiver of rights. *Pavey*, at ¶ 7-10.

The Montana Supreme Court in *Pavey* affirmed the district court's order denying the defendant's motion to dismiss for lack of speedy trial. The Montana Supreme Court held the defendant did not reserve his right to appeal the denial of his

speedy trial motions. *Pavey*, at ¶ 13. The Montana Supreme Court noted, however, that the district court's resetting of the speedy trial clock and dividing the time intervals was incorrect. The Montana Supreme Court concluded that a guilty plea does not represent "the date of disposition of the case" if, as in *Pavey*, the guilty plea is withdrawn before sentencing. If a guilty plea is withdrawn before sentencing, the district court must consider the entire period from accusation to the scheduled trial date and attribute the delay from the guilty plea to the withdraw of the guilty plea to the appropriate party. *Pavey*, at ¶ 6, FN1.

Here, contrary to *Pavey*, Defendant has not withdrawn his guilty plea. The Montana Supreme Court has repeatedly held that a voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses, and the alleged violation of the right to a speedy trial is a nonjurisdictional defect claim. "Consequently, after the plea, the defendant may only attack the voluntary and intelligent character of the plea, any jurisdictional defects, and any specified adverse pretrial rulings he has reserved the right to appeal." *Pavey*, at ¶ 11 (citing *State v. Violette,* 2009 MT 19, ¶ 16, 349 Mont. 81, 201 P.3d 804; State v. Collier, 277 Mont. 46, 53, 919 P.2d 376, 381 (1996)). Thus, when Defendant plead guilty in this case and admitted he committed the criminal offense of bail jumping, he waived his right to allege a violation of his constitutional right to a speedy trial. Defendant may only attack the voluntary and intelligent character of the guilty plea. Defendant was invited to withdraw his guilty plea in the Court's November 27, 2012 order denying Defendant's objection to PFO notice, and the State has previously stated it would not

object to Defendant withdrawing his guilty plea; however, Defendant has still not moved to withdraw his guilty plea.

At the moment, it has been a little more than a year since Defendant was accused of the criminal offense of bail jumping; however, Defendant entered his guilty plea on April 19, 2012 and that currently represents "the date of disposition of the case." As such, the interval between accusation and the date Defendant entered his guilty plea is less than 200 days. Therefore, the 200 day threshold under factor one of the *Arigwe* balancing analysis is not triggered and further analysis is unnecessary. Nevertheless, the State concedes the length of delay is over 200 days and further analysis is warranted, perhaps in anticipation that Defendant will withdraw his guilty plea.

2. The Reasons for the Delay

Under factor two, the court first identifies each period of delay in bringing the defendant to trial. The court then attributes each period of delay to the appropriate party, with any delay not demonstrated to have been caused by the defendant or affirmatively waived by the defendant being attributed to the State by default. Finally, the court assigns weight to each period of delay based on the specific cause and motive for the delay. The significance of factor two in the balancing process is in the specific cause and culpability for each period of delay. The more delay caused by the State for unacceptable reasons such as lack of diligence or bad-faith, as opposed to valid reasons such as overcrowded court dockets or a missing witness, the more likely the defendant's speedy trial right has been violated. Likewise, the more delay caused by the defendant for reasons such

as avoiding being brought to trial, the less likely the speedy trial right has been violated. *Ariegwe*, at ¶ 108-09.

Here, the Court finds it has been over a year since Defendant was charged with the criminal offense of bail jumping. The State asserts it is arguable that it is responsible for 76 days of delay, including the time period between filing the complaint on March 5, 2012 and filing the information on April 2, 2012 (27 days); and the time period between Defendant objecting to PFO notice on April 27, 2012 and the State responding to Defendant's objection to PFO notice on June 13, 2012 (49 days). Although the State asserts Defendant is responsible for some delay, the State concludes the majority of the delay should be categorized as institutional delay. The Court finds the majority of the delay in this matter is attributed to the State by default; however, the Court concludes Defendant affirmatively waived his right to contest the delay by entering a guilty plea on April 19, 2013. Furthermore, the Court does not find the State lacked diligence or acted in bad faith in this matter.

3. The Defendant's Response to the Delay

Under factor three, the court evaluates the defendant's responses to the delay, such as acquiescence in and objections to pretrial delays. Beyond the number of times a defendant acquiesces in or objects to pretrial delays, the Court must evaluate the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the defendant was represented by counsel, and the defendant's pretrial conduct. The totality of the defendant's responses to the delays is indicative of

whether he or she actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right. The evaluation also serves as a gauge of the weights the court should asses to the other three factors in the balancing test. *Ariegwe*, at ¶ 110.

Here, the Court granted two requests for continuance by the State. On May 10, 2012, the State requested an extension of time to respond to Defendant's motion in opposition to PFO notice, and the State noted Defendant had no objection to the request for additional time. The State's second request for a continuance came at the sentencing hearing on January 17, 2013 when the State learned that Defendant filed this motion to dismiss for lack of speedy trial earlier that same day. Defendant did not object to the State's request for additional time to respond to Defendant's speedy trial motion. Prior to Defendant's speedy trial motion, Defendant acquiesced in all other delays associated with this case. The Court finds Defendant's conduct does not demonstrate a persistent or sincere desire to assert his speedy trial right and the record does not show a deprivation of the right.

4. Prejudice to the Defendant as a result of the Delay

Under factor four, the court assess whether the defendant has been prejudiced by the delay in light of the interests that the speedy trial right was designed to protect. Those interests are (a) preventing oppressive pretrial incarceration after considering all of the circumstances of the incarceration, (b) minimizing anxiety and concern caused by the presence of unresolved criminal charges, and (c) limiting the possibility that the defendant's ability to

present an effective defense will be impaired. With respect to the third interest, the court considers whether the delay has weakened the defendant's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence; however, because affirmative proof of particularized prejudice is not essential to every speedy trial claim, impairment of the defenses may be evaluated based on the other factors in the analysis, such as the length of the delay, the defendant's response to the delay, and the length of the pretrial incarceration. *Ariegwe*, at ¶ 111.

a. *Prevention of Oppressive Pretrial Incarceration*

Defendant has been incarcerated throughout the pendency of this matter. The State argues Defendant's pretrial incarceration is not oppressive because Defendant has been incarcerated in a separate matter during the pendency of these proceedings. As of March 15, 2012, in cause number DC-11-36, Defendant was sentenced to five years at the Department of Corrections with two years suspended and credit for time served on a charge of partner family member assault -3rd or subsequent offense. Thus, Defendant could not avoid pretrial incarceration during the pendency of these proceedings. The Court agrees with the State in concluding that Defendant's pretrial incarceration in this matter is not oppressive after considering all of the circumstances of the incarceration.

b. *Minimization of Defendant's Anxiety and Concerns*

Defendant suggests he has had anxiety and concern about his future during the pendency of this action. The State argues a certain amount of anxiety and concern are inherent in being charged with a

crime and that is why a speedy trial analysis focuses on how the anxiety is aggravated by the delay. The State contends Defendant's anxiety and concern about having unresolved criminal charges against him was eliminated when Defendant entered a plea of guilty at the arraignment. The State suggests the only anxiety or concern Defendant suffered during the pendency of this action was waiting to find out whether his ploy to avoid being designated as a PFO would be successful or not. The State further asserts that there was no rush for the Court to make a determination on Defendant's motion in opposition to PFO notice until the Court received the presentence investigation report. After reviewing this matter, the Court does not find Defendant's speedy trial interests were impacted by undue anxiety or concern associated with Defendant having unresolved charges against him.

c. *Defendant's Ability to Present an Effective Defense*

Defendant does not make an argument that the delay in this case has limited or impaired his ability to present an effective defense. After reviewing this matter, the Court does not find any delay in this case weakened Defendant's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Furthermore, Defendant has already entered a plea of guilty in relation to the charges against him in this matter. Therefore, the Court concludes Defendant has not demonstrated how his pretrial incarceration has prejudiced his ability to present an effective defense.

Balancing Test

Finally, the court must determine whether defendant has been deprived of the right to a speedy trial by balancing each of the foregoing four factors.